IN THE COURT OF APPEALS OF IOWA

No. 5-940 / 04-2042
Filed July 26, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

NASSER M. SAHIR,
Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County, Alan L. Pearson, Judge.

Nasser Sahir appeals his conviction for stalking. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Theresa Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, Fred H. McCaw, County Attorney, and Christine O'Connell Corken Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Mahan and Hecht, JJ.

MAHAN, J.

Nasser Sahir appeals his conviction for stalking, a class D felony, in violation of Iowa Code section 708.11(3)(b)(1) (2001). First, he argues the district court erred when it did not submit the issue of his protective orders to a jury at a separate sentencing trial. If we find this claim was not preserved, Sahir argues his counsel was ineffective by failing to object. Second, he argues his trial counsel inadequately objected to alleged prosecutorial misconduct. We affirm Sahir's conviction and preserve his ineffective assistance of counsel claim based on prosecutorial misconduct for possible postconviction relief proceedings.

I. Background Facts and Proceedings

Nasser and Carol Sahir were married for nearly thirteen years. After they decided to divorce, Carol and the couple's three daughters moved into an apartment. Sahir then relentlessly stalked and harassed Carol for a period of several months. He began following Carol and parking outside her apartment and workplace to watch her. He was eventually banned from her workplace. Carol obtained three protective orders against Sahir.[1] Notwithstanding the existence of the protective orders, Sahir's behavior became more brazen. He was eventually charged with stalking in violation of section 708.11(3)(b)(1). The trial information also noted he was subject to a sentencing enhancement because of the existence of a protective order.[2]

[1] The three protective orders were dated April 28, 2003; May 14, 2003; and June 9, 2003.

[2] Only the existence of a single criminal or civil protective order is needed for the enhancement. In this case, three protective orders were issued.

The jury convicted Sahir of aggravated misdemeanor stalking. The district court, at the sentencing proceeding, found that Sahir was subject to a protective order at the time of the stalking offense and pronounced judgment on a class D felony. Sahir was sentenced to an indeterminate term of five years. The sentence was suspended, and he was placed on probation for five years.

Sahir appeals his conviction and sentence. Sahir complains of two issues occurring at his trial. The first deals with the district court determination that the existence of the protective order as a sentencing enhancement criterion could be adjudicated in this case by the court instead of a jury. Although he did not object at the time, Sahir now argues the issue of the protective order should have been submitted for a jury determination at the sentencing phase.

The second deals with his counsel's failure to object to several comments the prosecutor made during Sahir's cross-examination and the closing argument. Sahir alleges these comments were prosecutorial misconduct.

II. Standard of Review

Sahir alleges violations of his rights under the Sixth and Fourteenth Amendments to the United States Constitution, and article one, section ten, of the Iowa Constitution. We review constitutional claims de novo. *In re Detention of Hodges*, 689 N.W.2d 467, 470 (Iowa 2004). We give deference to the district court's credibility determinations, but are not bound by its fact determinations. *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001).

III. Merits

A. *Protective Orders*

We first clarify what this appeal is *not* about. Sahir is not appealing the jury's verdict of guilty to the offense of aggravated misdemeanor stalking. In addition, the district court found, and Sahir does not contest, the existence of a protective order is not an element of stalking but is instead a factor of sentence enhancement. *State v. Beecher*, 616 N.W.2d 532, 538 (Iowa 2000). Therefore, Sahir does not contest the district court's refusal to submit the issue of the protective order to the jury at the initial guilt stage of his misdemeanor trial. As such, the jury's verdict of guilty to the offense of misdemeanor stalking must stand.

The crux of Sahir's appeal is that the district court erred in failing to submit the sentencing enhancement issue to a jury at a second proceeding dealing only with sentencing. The initial problem with that argument is that Sahir failed to take any steps whatsoever to preserve this issue for appeal.

Sahir relies on *Apprendi v. New Jersey*, 530 U.S. 466, 489, 120 S. Ct. 2348, 2362-63, 147 L. Ed. 2d 435, 455 (2000), to argue the district court erred when it failed to submit the issue of the existence of protective orders to the jury at sentencing. This, however, is the first time Sahir has raised this argument. At trial, he (1) testified to the existence of the protective orders; (2) stipulated in writing to the existence of the orders; (3) agreed with the district court that the jury need not be instructed on the orders; and (4) failed to raise any concern when the district court gave him ample notice it would be considering the orders for sentence enhancement. He did not request a jury trial at the sentencing

phase. Further, no steps were taken to bring the issue to the attention of the district court at sentencing. In short, the existence of the orders was never at issue during either the initial trial or the sentencing.

Further, Sahir's challenge is not to the court's use of discretion during his sentencing, nor to the legality of the sentence itself. If either of those challenges were at issue, Sahir would not have had to preserve his claim. *State v. Hickman*, 623 N.W.2d 847, 850 (Iowa 2001) (concluding no preservation was necessary where sentence was contrary to the Code and therefore void); *State v. Thomas*, 520 N.W.2d 311, 313 (Iowa 1994) (rejecting rule that defendant had to object during sentencing when sentence imposed was discretionary).

Instead, Sahir asserts a procedural constitutional claim to a legal sentence. *See Schriro v. Summerlin*, 542 U.S. 348, 353-55, 124 S. Ct. 2519, 2523-24, 159 L. Ed. 2d 442, 448-50 (2004) (noting the Sixth Amendment right to have a jury find sentence enhancements is properly characterized as a procedural right). He is required to raise such a claim with the district court. *See State v. Ramirez*, 597 N.W.2d 795, 797 (Iowa 1999) (denying defendant's cruel and unusual punishment challenge because he failed to bring it in the trial court, but reviewing the challenge through ineffective assistance); *State v. Hoskins*, 586 N.W.2d 707, 709 (Iowa 1998) (noting that a challenge to a sentence imposed in accordance with the law is governed by normal error preservation and reviewing defendant's constitutional claim through ineffective assistance). Because Sahir

failed to raise the issue below, we cannot review it.[3] *Meier v. Senecaut III*, 641 N.W.2d 532, 537 (Iowa 2002); *McCright*, 569 N.W.2d at 607.

In the alternative, Sahir asks that we examine his claim through ineffective assistance of counsel. He argues his counsel was ineffective when he failed to object to the district court's failure to submit the issue of the protective orders to a jury at the time of sentencing.

In order to show ineffectiveness of counsel, Sahir must show not only that his counsel breached an essential duty, but also that the breach prejudiced Sahir's defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). In reviewing Sahir's claim, we are to consider the totality of the evidence. *Id.* at 695, 104 S. Ct. at 2069, 80 L. Ed. 2d at 698. The test we employ for the first element is objective: whether counsel's performance was outside the range of normal competency. *State v. Kone*, 557 N.W.2d 97, 102 (Iowa Ct. App. 1997). We start with a strong presumption that counsel's conduct was within the "wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2052, 80 L. Ed. 2d at 694. The test for the second element is whether there is a reasonable probability that, without counsel's errors, the outcome of the proceeding would have been different. *Id.* at 694, 104 S. Ct. at 2052, 80 L. Ed. 2d at 698. A reasonable probability is one that undermines confidence in the outcome. *Id.*; *Kone*, 557

[3] Sahir argues that because the jury instructions were in his favor, he had no duty at the time to object. *State v. Roe*, 642 N.W.2d 252, 255 (Iowa 2002). However, because the trial court also informed Sahir the orders were a sentencing consideration, Sahir had notice that the orders would be used against him. Even at sentencing, when the use of the orders was not in his favor, Sahir failed to object. To address the issue now would violate the "fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Meier v. Senecaut III*, 641 N.W.2d 532, 537 (Iowa 2002).

N.W.2d at 102. We only presume prejudice if counsel completely fails to subject the prosecution's case to meaningful adversarial testing. *United States v. White*, 341 F.3d 673, 678 (8th Cir. 2003).

Generally, we decline to decide ineffective assistance of counsel claims on direct appeal. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). Instead, we preserve them for postconviction relief proceedings. *Id.* This practice ensures both that an adequate record of the claim may be developed and that the attorney charged with ineffectiveness may have an opportunity to respond. *Id.* We will only decide an ineffectiveness claim on direct appeal in limited situations. First, if the record shows that the claimant cannot prevail as a matter of law, we will affirm the conviction without preserving the ineffective assistance claim. *State v. Graves*, 668 N.W.2d 860, 869 (2003). Second, "if the record on appeal establishes both elements of an ineffective-assistance claim and an evidentiary hearing would not alter this conclusion, we will reverse the defendant's conviction and remand for a new trial." *Id.* For example, we may decide the claim if counsel's performance was so glaringly incompetent we are able to determine so based on the record before us. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). We have also decided the claim where the trial court has already addressed the issue. *See State v. Poyner*, 306 N.W.2d 716, 719-20 (Iowa 1981).

It has become well-settled law that Fifth Amendment due process and the Sixth Amendment right to a jury trial require any fact tending to enhance a defendant's sentence be submitted to a jury and found beyond a reasonable doubt. *Jones v. United States*, 526 U.S. 227, 243 n.6, 119 S. Ct. 1215, 1224 n.6, 143 L. Ed. 2d 311, 326 n.6 (1999). The United States Supreme Court intimated

as much in 1975, when it refused to allow Maine to redefine elements of a crime as facts going to sentencing in order to avoid proving them beyond a reasonable doubt. *Mullaney v. Wilbur*, 421 U.S. 684, 698-703, 95 S. Ct. 1881, 1889-92, 44 L. Ed. 2d 508, 519-22 (1975).

The specter of the Fifth and Sixth Amendment guarantees rose again in *McMillan v. Pennsylvania*, 477 U.S. 79, 88, 106 S. Ct. 2411, 2417, 91 L. Ed. 2d 67, 77-78 (1986). There, the Court rejected the petitioner's claim that any fact predicating a minimum sentence had to be found beyond a reasonable doubt, but observed its decision would be different had the fact "exposed [petitioner] to greater or additional punishment." *McMilllan*, 477 U.S. at 88, 106 S. Ct. at 2417, 91 L. Ed. 2d at 78; *see also Apprendi*, 530 U.S. at 485-87, 120 S. Ct. at 2360-61, 147 L. Ed. 2d at 451-53.

Any doubt was resolved in *Jones v. United States*. The Court plainly stated that, absent a waiver, "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact . . . that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones*, 526 U.S. at 243 n.6, 119 S. Ct. at 1224 n.6, 143 L. Ed. 2d at 326 n.6.

Apprendi further substantiated the principle. In that case, the Court reviewed the history of the jury trial right. It ultimately concluded that authorities dating from Blackstone to the present support the standard enunciated in *Jones*. According to *Apprendi*, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved

beyond a reasonable doubt." *Apprendi*, 530 U.S. at 489, 120 S. Ct. at 2362-63, 147 L. Ed. 2d at 455.[4]

Our supreme court adopted *Apprendi* in *State v. Jacobs*, 644 N.W.2d 695 (2001). Nearly forty years before, however, our state legislature required prior convictions used as sentence enhancements to be determined by a jury. *State v. Wessling*, 260 Iowa 1244, 1259, 150 N.W.2d 301, 310 (1967). Iowa Rule of Criminal Procedure 2.19(9) requires, after conviction on the primary offense, a separate jury trial to determine any prior convictions alleged in the indictment. Though rule 2.19(9) was adopted to prevent unfair prejudice against the defendant, it nonetheless requires a *jury* to find the prior conviction, not a judge acting alone. *Wessling*, 260 Iowa at 1259-60, 150 N.W.2d at 310. We stop short, however, of finding Sahir's counsel breached an essential duty because we instead decide the issue on the prejudice prong.

The State argues that since Sahir admitted he was subject to the protective orders, he cannot show the prejudice requisite to his ineffective assistance claim. *Apprendi* indicates that, given procedural safeguards are

[4] The importance of the Sixth Amendment right to have a jury determine the facts leading to sentence enhancement was solidified in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). In *Ring*, the Court struck down part of Arizona's capital sentencing scheme that allowed judges to determine the facts that elevated a life sentence to a death sentence. *Ring*, 536 U.S. at 609, 122 S. Ct. at 2443, 153 L. Ed. 2d at 576-77. *Blakely* reversed a Washington state case where the defendant was sentenced to three years beyond the statutory maximum based on the judge's finding he had acted with "deliberate cruelty." *Blakely*, 542 U.S. at 313-14, 124 S. Ct. at 2543, 159 L. Ed. 2d at 420. Finally, *Booker* concluded the Federal Sentencing Guidelines violated the Sixth Amendment insofar as they allowed a defendant to be sentenced based on a judge's determination of a fact not found by a jury. *Booker*, 543 U.S. at 242-44, 125 S. Ct. at 755-56, 160 L. Ed. 2d at 650.

present, a defendant may in fact waive the right to have a jury determine sentence enhancements. *Apprendi*, 530 U.S. at 488, 120 S. Ct. at 2361-62, 147 L. Ed. 2d at 453. The Court explained the waiver further in *Blakely v. Washington*, 542 U.S. 296, 310, 124 S. Ct. 2531, 2541, 159 L. Ed. 2d 403, 417-18 (2004), concluding:

> [N]othing prevents a defendant from waiving his *Apprendi* rights. When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding. If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty. Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which may well be in his interest if relevant evidence would prejudice him at trial.

(Citations omitted.) *Booker* also acknowledged that a defendant could be sentenced based on admitted facts. *Booker*, 543 U.S. at 244, 125 S. Ct. at 756, 160 L. Ed. 2d at 658 (holding "[a]ny fact . . . which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt").[5]

There is an initial problem with the State's conclusion, however. In Iowa, *Apprendi*'s acknowledgment of "procedural safeguards" and *Blakely*'s caution about procuring "appropriate waivers" are given real substance. According to rule 2.19(9), "if the defendant affirms the validity of the prior convictions, then the

[5] We note that *Blakely* was decided just after Sahir's trial, but five months before his sentencing. *Booker* was decided nearly six months after Sahir's trial and about a month after his sentencing. We therefore do not rely on those cases for any new law they might have established, but instead for their restatements of the principles outlined in *Apprendi*.

case proceeds to sentencing." *State v. Kukowski*, 704 N.W.2d 687, 692 (2005).[6] That, however, is not the end of the proceeding. Even if the defendant acknowledges the prior convictions, the court must determine whether the defendant's admission is intelligent and voluntary. As the supreme court recently stated in *Kukowski*,

> [a]n affirmative response by the defendant under the rule, however, does not necessarily serve as an admission to support the imposition of an enhanced penalty as a multiple offender. The court has a duty to conduct a further inquiry, similar to the colloquy required under rule 2.8(2), prior to sentencing to ensure that the affirmation is voluntary and intelligent.

Id. at 692 (citations omitted).

Though the colloquy required under rule 2.8(2) is not expressly required in rule 2.19(9), we have consistently required some indication that the defendant had some knowledge of the ramifications of admitting to a prior conviction. In fact, the supreme court has acknowledged that "a defendant's admission of prior felony convictions which provide the predicate for sentencing as an habitual offender is so closely analogous to a plea of guilty that it is appropriate to refer to our rules governing guilty pleas." *State v. Brady*, 442 N.W.2d 57, 58 (Iowa 1989); *see also State v. Oetken*, 613 N.W.2d 679, 687 (Iowa 2000) (noting trial courts have a "duty to inform the defendant as to the ramifications of an habitual offender adjudication"); *State v. Bumpus*, 459 N.W.2d 619, 625 (Iowa 1990) (recognizing "our rules governing guilty pleas should be applied" to a defendant's admission of prior convictions); *State v. McBride*, 625 N.W.2d 372, 374-75 (Iowa

[6] We note *Kukowski* was also decided after Sahir's initial trial. We rely on it only insofar as it succinctly restates established Iowa law on the acceptance of admissions for sentencing purposes.

Ct. App. 2001) ("[T]rial courts have a duty to ensure that defendants knowingly and voluntarily stipulate to having prior convictions. . . . In order to knowingly stipulate, a defendant should have an adequate grasp of the implications of his or her stipulation.").

We see no difference between a defendant stipulating to prior convictions that will enhance a sentence upon conviction and a defendant stipulating to other facts that will enhance a sentence upon conviction. Both are admitting a fact that will increase a sentence beyond the statutory maximum. In the latter case, where it may be more difficult for the State to prove the existence of the fact, it is especially important the defendant is aware of the ramifications of an admission. Logic persuades us the same protections afforded to a defendant who admits a prior conviction extend to a defendant who admits other facts that will enhance a sentence.

Notwithstanding this discussion, we agree with the State that Sahir was not prejudiced by any alleged breach of an essential duty on the part of his counsel. Sahir admitted the existence of the protective orders during the misdemeanor trial. Indeed, he repeatedly acknowledged their existence in his testimony. In addition, he stipulated in writing to their existence. This stipulation allowed consideration of the certified copies of the protective orders for all purposes allowed under the rules of criminal procedure. Sahir agreed the existence of these protective orders was a sentencing enhancement issue as opposed to an element to the stalking offense. Finally, he did not object to having the judge decide the sentencing enhancement issue. We conclude, given all of the above factors, that no rational jury could have determined the protective

orders did not exist. There is no reasonable probability Sahir could have escaped sentencing on the class D felony. As such, he has failed to establish prejudice.

B. *Prosecutorial Misconduct*

Again, in order to show his counsel's performance was ineffective with respect to the alleged prosecutorial misconduct, Sahir must show (1) his counsel's performance was deficient and (2) that deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.

Neither of the exceptions to the rule about preserving ineffective assistance claims discussed above applies here. Sahir claims his attorney did not adequately object to what he alleges was prosecutorial misconduct. While we have the transcript from the trial, we do not have Sahir's attorney's response to these allegations. As a result, the record is not complete enough for us to make a decision as to the attorney's ineffectiveness. We preserve this claim for any postconviction proceedings Sahir may wish to commence.

IV. Summary

We affirm Sahir's conviction. Sahir's ineffective assistance claims stemming from alleged prosecutorial misconduct are preserved for possible postconviction relief proceedings.

AFFIRMED.